Case No. 92-50 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

KENNETH EDWARD HOLLAND,

Petitioner,

v.

THE COMMONWEALTH OF VIRGINIA, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether petitioner, who has prevailed in a Virginia Workers' Compensation proceeding and who has received all benefits due him under the Virginia Workers' Compensation Act, has stated a cause of action for deprivation of a constitutionally protected interest cognizable under 42 U.S.C. § 1983 against the respondents, Dr. James D. Dillon, a private practitioner specializing in the field of neurosurgery, and his employer Commonwealth Neurosurgery, Ltd., a Virginia professional corporation, and which meets the criteria of Rule 10, Rules of United States Supreme Court, for granting a review on writ of certiorari.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE.....	2
ARGUMENT	
I. 42 USC § 1983 PROVIDES NO BASIS FOR A CAUSE OF ACTION AGAINST A PRIVATE PHYSICIAN EXERCISING HIS INDEPENDENT JUDGMENT WITH REGARD TO TREATMENT OF A PATIENT.....	8
II. THE COURT IS WITHOUT SUBJECT MATTER JURISDICTION OVER THIS CLAIM.....	17
III. THIS PETITION PRESENTS NO EVIDENCE OF ANY CONFLICT WITH THE DECISIONS OF THIS COURT OR AMONG THE CIRCUITS, AND THERE EXISTS NO IMPORTANT FEDERAL QUESTION WHICH SHOULD BE DECIDED BY THIS COURT.....	19
CONCLUSION.....	21

TABLE OF AUTHORITIES

Page

Cases:

Barnes v. Lehman,
861 F.2d 1383 (1988)..... 14

Blum v. Yaretsky,
457 US 991 (1982)..... 14

Cruzan v. Director, Missouri Dept. of Health,
497 US 261 (1990)..... 9

Daniels v. Williams,
474 US 327 (1986)..... 8

Flagg Bros., Inc. v. Brooks,
436 US 149 (1978)..... 8

Luger v. Edmondson Oil Co., Inc.,
457 US 922 (1982)..... 9, 11-12

Papason v. Allain,
478 US 265 (1986)..... 18

Parratt v. Taylor,
451 US 527 (1981)..... 8

Constitution:

United States Constitution,
Amendment XIV..... 20

Statutes:

Federal:

42 USC § 1983..... 8, 17

State:

Va. Code § 8.01-243..... 18
Va. Code § 65.1-88..... 16
Va. Code § 65.1-88.1..... 13

Miscellaneous:

F.R.C.P. 12(b)(1)..... 19
F.R.C.P. 12(b)(6)..... 17

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Respondent, Dr. James D. Dillon (hereinafter Dr. Dillon), respectfully requests that this honorable Court deny the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered February 21, 1992 in an unpublished opinion.

STATEMENT OF THE CASE

On March 25, 1988, Petitioner, Kenneth Edward Holland ("Holland"), sustained an injury during the course of his employment. This injury was compensable under the Virginia Workers' Compensation Act ("the Act").

Dr. Dillon's involvement in Holland's case occurred on May 25, 1988, when Holland was referred to him by Holland's personally selected private physician, Dr. Morina. Dr. Dillon is a board-certified neurosurgeon in private practice in Virginia Beach, Virginia. Dr. Morina requested Dr. Dillon to examine Holland, due to Holland's complaint of lower back pain associated with bilateral leg weakness and numbness. The purpose of the visit to Dr. Dillon was to determine if the complaint of pain was due to some

cause which could be relieved or improved by surgery.

Following a thorough examination of Mr. Holland and review of available radiographic and MRI studies, the exact cause of Mr. Holland's problems was still unclear. Dr. Dillon therefore ordered further tests to determine if Mr. Holland was, in fact, in need of spinal surgery. The tests ordered by Dr. Dillon consisted of an EMG, flexion extension x-rays of the lumbar spine, and a bone scan. Anticipating completion of these tests, Dr. Dillon ordered a follow-up examination of Mr. Holland for June 15, 1988.

On June 9, 1988, Dr. James E. Bosworth examined Mr. Holland with the benefit of the flexion extension x-rays of his lumbar spine. Dr. Bosworth, a board-certified radiologist with the Department of Radiology, Virginia Beach General Hospital, noted that the x-rays revealed a

suspicious area which could be the site of an infection or metastatic disease. Acting pursuant to this knowledge, Dr. Bosworth also recommended that Mr. Holland undergo a bone scan. Mr. Holland, however, refused to consent to the administration of the isotope required for the bone scan, and the test was not performed pursuant to his wishes.

Upon learning of Mr. Holland's refusal to undergo the bone scan test, Dr. Dillon evaluated the studies that had been performed and determined that they alone revealed no pathology which warranted neurosurgery. On this basis, Dr. Dillon felt his services were no longer warranted and referred Mr. Holland back to his treating physician, Dr. Morina. Dr. Dillon informed Dr. Morina and Mr. Holland's employer's workers' compensation insurer, Liberty Mutual Insurance Company

("Liberty Mutual") of this decision by letter dated June 15, 1988. Thereafter, Dr. Dillon provided no further care or treatment to Mr. Holland.

On October 4, 1988, a hearing was held before a Deputy Commissioner of the Virginia Industrial Commission (now called the Virginia Workers' Compensation Commission) on application of Liberty Mutual and Holland's employer, Virginia Bridge & Structures, Inc. ("Virginia Bridge"), for termination of benefits based upon Mr. Holland's refusal of medical treatment. The Deputy Commissioner found that Mr. Holland's refusal was unjustified and ruled in favor of Liberty Mutual and Virginia Bridge. This decision was adopted by the full Commission on review, but was later reversed on appeal by the Court of Appeals of Virginia. The Court of Appeals ordered Mr. Holland's benefits to be reinstated

effective July 21, 1988, the date Liberty Mutual had filed it's application for termination which acted as a suspension of the award. The benefits were thereafter restored with payment of past due benefits, interest and a penalty as prescribed by law.

The Court of Appeals of Virginia denied petitioner's "Motion to Allow Additional Damages" pursuant to 42 U.S.C. § 1983. Holland filed a Petition for Appeal before the Supreme Court of Virginia seeking a reversal of the Order denying his "Motion to Allow Additional Damages" pursuant to 42 U.S.C. § 1983. The Virginia Supreme Court denied this Petition for Appeal.

On or about February 1, 1991, Holland filed his complaint in the United States District Court for the Eastern District of Virginia against multiple defendants, including Dr. Dillon and Commonwealth Neurosurgery, Ltd. The complaint was a

rambling recitation consisting almost entirely of conclusory allegations of law. As can best be determined, Holland's complaint against Dr. Dillon contained a bare allegation that Dr. Dillon had breached either an express or implied contract somehow leading to or causing deprivation of Mr. Holland's "rights to privacy, due process, and equal protection of the laws with subsequent imposition of cruel and unusual punishment."

The District Court dismissed Mr. Holland's complaint as to Dr. Dillon and Commonwealth Neurosurgery on May 16, 1991, following oral argument on Motions to Dismiss filed by these defendants pursuant to F.R.C.P. 12(b)(1) and 12(b)(6), finding that there was no violation of any constitutionally-protected rights of the plaintiff and that there was no state action involving Dr. Dillon. The Court of

Appeals for the Fourth Circuit affirmed, finding no merit to the appeal.

ARGUMENT

I. 42 U.S.C. § 1983 PROVIDES NO BASIS FOR A CAUSE OF ACTION AGAINST A PRIVATE PHYSICIAN EXERCISING HIS INDEPENDENT JUDGMENT WITH REGARD TO TREATMENT OF A PATIENT.

In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege a violation of a right secured by the Constitution and the laws of the United States and must show that this violation was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988), citing Parratt v. Taylor, 451 U.S. 527, 535 (1981) (overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327, 330-331 (1986)); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978). Where the first prong of this test is sought to be satisfied, as it is here, by claiming a

violation of the Fourteenth Amendment to the Constitution, the necessary showing of state action under the Fourteenth Amendment will also satisfy the "acting under color of state law" requirement of the second prong of the test. Luger v. Edmondson Oil Co., Inc., 457 U.S. 922, 935 (1982). Dr. Dillon's conduct in this case comes within the scope of 42 USC § 1983 only if it deprived Mr. Holland of a right secured by the Constitution or the laws of the United States and it constituted state action. Mr. Holland fails to meet either requirement.

Mr. Holland's only stated basis for his allegation that he was deprived of a right protected by the Constitution or by federal statute is that he was deprived of his right to refuse medical treatment, citing Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990). That case is inapposite.

The Cruzan decision stood for the proposition that every citizen has the right to refuse unwanted medical treatment. In the case now before this Court, it is not disputed that Mr. Holland did not want to undergo the bone scan recommended by two physicians, Dr. Dillon and Dr. Bosworth, and that his wishes in this regard were respected. He did not submit to the bone scan and none was done. Mr. Holland's complaint, in reality, is not that he was forced to accept medical treatment he did not want, but that he was required to accept the consequences of that refusal, the petition to terminate benefits.

Mr. Holland appealed this termination and ultimately won on appeal and he received all benefits due him under the law. His real grievance is that the process to obtain his reinstatement took time and the law does not provide

compensation for this time beyond the payment of past due benefits, interest and penalty. The fact that the Virginia Workers' Compensation Act provides no cause of action for emotional distress or inconvenience occasioned by the time required during legal proceedings does not violate the Constitution of the United States nor any statute, federal or state. Therefore, Mr. Holland fails to satisfy the first requirement to maintain a 42 U.S.C. § 1983 action.

Even were it assumed, arguendo, that Holland met this initial test, he fails the "state action" requirement. This Court has established a two-part test for determining when conduct alleged to have caused a deprivation of a federal right can be fairly attributed to the state so as to constitute state action. Luger at 937. First, the deprivation must be caused by the exercise of some right or

privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. Second, the individual alleged to have caused the deprivation must be a person who may fairly be said to be a state actor. Id. at 937. Viewing these two requirements individually, Dr. Dillon's action cannot be said to have met either.

Dr. Dillon's sole involvement in this matter consists of an examination and recommendation for further testing of Holland, done as a private neurosurgical consultant at the request of petitioner's private physician, Dr. Morina, a letter sent to Liberty Mutual, informing them of Mr. Holland's refusal to consent to the bone scan test, and Dr. Dillon's subsequent professional decision that without the test there was no more he could do for Mr. Holland. While it is not

clear from petitioner's original complaint, subsequent briefs, or petition for writ of certiorari, presumably this is the asserted conduct by Dr. Dillon which caused the alleged deprivation of petitioner's fundamental rights. In no way, however, can this conduct be deemed to constitute the exercise of some right or privilege created by the state. If any state involvement can be claimed, it must be that the writing of this letter was the result of a rule of conduct imposed by the state. See, Virginia Code Annotated § 65.1-88.1 (Repl. Vol. 1987).[1] This argument for linking Dr. Dillon's actions to the state, however, must also fail because procedural regulations cannot change private action into state action

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[1] *Since the institution of this action, the Virginia legislature has recodified the Workman's Compensation Act. See, Virginia Code Annotated § 65.2-100, et seq. (Repl. Vol. 1991).*

unless they dictate the actual challenged action. Barnes v. Lehman, 861 F.2d 1383, 1387 (1988) (citing Blum v. Yaretsky, 457 U.S. 991, 1010 (1982)). Mr. Holland is not challenging the actual writing of the letter, but rather the end product of the chain of events he alleges it set off.

Assuming, arguendo again, that this Court was willing to accept that Dr. Dillon's action meets the first prong of the "fair attribution" test, Dr. Dillon cannot be fairly said to be a state actor. Dr. Dillon is a private practitioner licensed to practice in the Commonwealth of Virginia. He is not, nor has he ever been alleged to be, an employee of the state or any other arm of the government. In treating Mr. Holland, Dr. Dillon was not acting pursuant to any contract with the state or any other governmental organization. Dr. Dillon wrote the letter of his own free will, without the

encouragement or command of any state agent, and he did not derive any benefits from the state as a result of the letter.

Petitioner attempts to liken this case to that of West, but the dissimilarities are simply too great. In West, the doctor was employed by the state to provide medical care to inmates at one of the state's correctional facilities. An inmate brought a § 1983 action against the doctor for violation of his Eighth Amendment rights. This Court held that a physician under contract with the state to provide medical services to inmates at state prisons acted under color of state law within the meaning of § 1983, when he treated an inmate. In that case, the Court based this finding on the fact that, in this limited situation, the doctor was fulfilling a duty placed upon the state by the Constitution and for which the state is responsible. This Court also relied

heavily on the fact that the prisoners had no ability to seek alternative care elsewhere.

None of the factors this Court found compelling in West are present under the facts of this case. There existed no contract between Dr. Dillon and the Commonwealth of Virginia for care of workers' compensation patients. In fact, the Commonwealth has no duty to provide medical treatment to anyone under the Workers' Compensation Act. Finally, contrary to petitioner's assertions, Mr. Holland was fully able to seek care from another doctor besides Dr. Dillon. See, Virginia Code Annotated § 65.1-88 (Repl. Vol. 1987). Also, Mr. Holland was free to seek medical care from any doctor at his own expense.

WHEREFORE, there being no violation of a right secured by the Constitution or by statute and there being no "state action"

by Dr. Dillon, it is respectfully submitted that the petitioner has failed to state a claim under 42 U.S.C. § 1983 for which relief may be granted as to Dr. Dillon. Therefore, the District Court did not err in dismissing this action pursuant to F.R.C.P. 12(b)(6).

II. THE COURT IS WITHOUT SUBJECT MATTER JURISDICTION OVER THIS CLAIM.

Because this is a Court of limited jurisdiction, the petitioner has the burden of establishing the jurisdiction of the Court over his claims. The petitioner asserts in his Statement of Jurisdiction no basis for federal jurisdiction other than under 42 U.S.C. § 1983 which has already been addressed.

The petitioner's specific complaints against Dr. Dillon are raised in three pages of his petition to this Court. See, petitioner's Petition for Writ of Certiorari, pp. 44-46. In these pages,

petitioner asserts legal conclusions as though they were facts. This Court need not accept as true mere legal conclusions couched as factual allegations. Papason v. Allain, 478 U.S. 265, 286 (1986). Stripped of these unsupported assertions, petitioner's complaint against Dr. Dillon rests on the allegation of some breach of an alleged express or implied contract. Breach of contract claims are cognizable only in state court absent some independent basis for federal jurisdiction, none of which have been alleged here. Furthermore, absent an express guarantee of cure, allegations of mistreatment, abandonment, or other acts of omission or commission by a physician under Virginia law sound in tort and not in contract, and they are subject to a two-year statute of limitations. See, Virginia Code § 8.01-243 (Cum. Supp. 1991). Dr. Dillon's last treatment of Mr.

Holland occurred at the latest in June of 1988, and as such, Mr. Holland's complaint filed in federal district court in February of 1991, would be barred under the statute of limitations even if some independent basis for federal jurisdiction could be found.

WHEREFORE, it is respectfully submitted that no federal jurisdiction exists as to the complaint against Dr. Dillon. Therefore the District Court did not err in dismissing this complaint pursuant to F.R.C.P. 12(b)(1).

III. THIS PETITION PRESENTS NO EVIDENCE OF ANY CONFLICT WITH THE DECISIONS OF THIS COURT OR AMONG THE CIRCUITS AND THERE EXISTS NO IMPORTANT FEDERAL QUESTION WHICH SHOULD BE DECIDED BY THIS COURT.

Petitioner asserts in his petition that the decision rendered by the District Court and upheld by the Court of Appeals is in conflict with decisions of this Court and with the Fourteenth Amendment to

the Constitution. See petitioner's Petition for Writ of Certiorari, page 24. Thereafter, petitioner cites no case law which demonstrate a conflict nor does he explain how his rights under the Fourteenth Amendment have been violated.

Invoking the Fourteenth Amendment, Mr. Holland asserts that his rights to liberty, equal protection, protection of the law, and substantive due process have been violated. Mr. Holland's statements regarding these rights end with this allegation. He provides no evidence of a deprivation of freedom or of an improper classification on the basis of race, religion, sex, age, or any other basis which would be improper. As for his substantive due process claim, he has been unable to show any deprivation by state action.

Mr. Holland continually invokes the opinion of Crúzan for the point that the

due process clause protects a patient's rights to reject medical treatment, but yet Mr. Holland was never subjected to unwanted medical treatment. His wishes not to be injected with the isotope needed for the bone scan test were respected, and the Court of Appeals of Virginia determined this refusal to be justified.

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari presents no conflict among the Circuits or with this Court's prior decisions and no important federal question exists.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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